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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 DAVID JOHANSEN, et al.,

4 Plaintiffs,

New York, N.Y.

5 v.

19 Civ. 1094(ER)

6 SONY MUSIC ENTERTAINMENT INC.,
7 et al.,

8 Defendants.

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9 May 21, 2019

10 2:33 p.m.

11 Before:

12 HON. EDGARDO RAMOS,

13 District Judge

14 APPEARANCES

15 BLANK ROME, LLP (PA)
Attorneys for Plaintiffs

16 BY: RYAN EDWARD CRONIN
DAVID MICHAEL PERRY

17 GIBSON, DUNN & CRUTCHER, LLP
18 Attorneys for Defendants

19 BY: SCOTT A. EDELMAN
GABRIELLE FRANCES LEVIN

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1 THE CLERK: In the matter of Johansen v. Sony Music.

2 Counsel, please state your name for the record

3 MR. CRONIN: Ryan Cronin, from Blank Rome, on behalf
4 of plaintiffs.

5 MR. PERRY: David Perry, from Blank Rome, on behalf of
6 plaintiffs.

7 MR. EDELMAN: Good afternoon, your Honor. Scott
8 Edelman on behalf of Defendant Sony.

9 MS. LEVIN: And Gabrielle Levin, your Honor, from
10 Gibson Dunn, on behalf of Defendant Sony.

11 THE COURT: Good afternoon to you all.

12 This matter is on for a premotion conference. I
13 believe that the plaintiffs requested the conference. Go
14 ahead.

15 MR. CRONIN: No, your Honor.

16 THE COURT: Defendants requested the conference?

17 MR. EDELMAN: No, your Honor. I believe we are just
18 here pursuant to our understanding of your local rules.

19 THE COURT: That what?

20 MR. EDELMAN: We're here, your Honor, because we want
21 to make a motion to dismiss, and so we are here to have the
22 premotion conference which we understood was required by your
23 Honor.

24 THE COURT: Yes.

25 MR. EDELMAN: I got lost there.

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1 THE COURT: So you requested the conference?

2 MR. EDELMAN: That is correct. I'm sorry. I
3 misunderstood. Yes.

4 THE COURT: OK. So tell me why I should let you make
5 this motion.

6 MR. EDELMAN: Thank you, your Honor.

7 Your Honor, so this is a putative class action that
8 relates to the rights to terminate under Section 203 of the
9 Copyright Act, and we have requested permission to file a
10 motion because there are material and irreparable, in our view,
11 mistakes in the Notice of Termination which were propounded by
12 plaintiffs' counsel which form the basis of the Notice of
13 Termination.

14 THE COURT: Why are they irreparable?

15 MR. EDELMAN: They are irreparable because the
16 particular transgressions are jurisdictional. They are not
17 things that lend themselves to the harmless error doctrine.
18 They are things that relate specifically to whether the right
19 to terminate is even implicated.

20 As your Honor is aware -- and I know you've got
21 another case that is similar to this one but different in
22 certain respects -- in order to terminate or to attempt to
23 terminate the copyright under Section 203 of the Copyright Act,
24 there is a particular timing requirement. You have to do it --
25 the right to terminate arises at the end of 35 years from the

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1 date of publication or 40 years from execution, whichever is
2 earlier.

3 In this particular case, with respect to two of the
4 recording artists, two of the artist, Johansen and Lyon, the
5 termination notices were sent in 2017 but they purport to
6 terminate grants in 1984. So by simple math, if you add 35
7 years, the earliest possible, to 1984, you get to a date of
8 2019 as to when the right would have arisen to terminate. We
9 have termination notices that were sent two years early. There
10 is no way to fix that. They can -- obviously, it is your
11 Honor's call, but our position is that is a jurisdictional
12 defect that doesn't go to harmless error, it goes to the right
13 to terminate in the first instance. So that's one of the --

14 THE COURT: So two years prior to termination is too
15 late to have given notice?

16 MR. EDELMAN: They gave notice too early.

17 THE COURT: It's notice. So what is the window within
18 which they can give notice?

19 MR. EDELMAN: They can give notice at the end of 35
20 years from publication, so --

21 THE COURT: I thought that it terminated after 35
22 years. So don't you have to give notice prior to termination.

23 MR. EDELMAN: You have to give notice between two and
24 10 years prior to termination, but you can't give notice before
25 35 years. So here they gave notice in 2017 relating to a 1984

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1 alleged grant. So, the notice could not have been sent until
2 2019 and they sent it in 2017.

3 THE COURT: I'm sorry. So if the execution was in
4 1984, 35 years later is 2019?

5 MR. EDELMAN: Correct.

6 THE COURT: So how is it notice if you don't get the
7 notice before it terminates, before the grant terminates?

8 I'm lost. So, you say there is a window.

9 MR. EDELMAN: There is a window. There is a window of
10 between 35 years from publication and 40 years from execution,
11 whichever is earlier.

12 THE COURT: A window within which notice can be given?

13 MR. EDELMAN: Correct.

14 THE COURT: And what is that?

15 MR. EDELMAN: So the first window, the window would
16 have opened for a 1984 grant, notice could have been given
17 effective for 2019, and it was sent in 2017.

18 THE COURT: OK. So you got it too early.

19 MR. EDELMAN: We got it too early. And the right to
20 terminate does not arise until 2019, and so the notice is not
21 effective.

22 THE COURT: So what if they just sent a notice in
23 2019, a subsequent notice? Why is it irreparable?

24 MR. EDELMAN: It is irreparable because there is a
25 jurisdictional timing requirement under the statute. They have

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1 to give notice two years before they can terminate. So that's
2 why they did it in 2017, waited two years, but they -- if they
3 give notice now, they have to wait between two and 10 years to
4 then try to terminate their rights. They can't just proceed on
5 the basis of a defective notice. This is the regime that is
6 very carefully articulated in Section 203 of the Copyright Act
7 in order for such a notice to be effective.

8 There are other -- there is another timing problem,
9 your Honor, with respect to another one of the termination
10 notices relating to Collins. That is a termination notice
11 that's dated July 15th of 2015. It provides an effective date
12 of July 16th -- I'm sorry, of June 16, 2017, which is 23 months
13 later, and the Copyright Act requires a minimum of between two
14 and 10 years for notice. So this is a defect that relates not
15 just to how the matter is pled in the complaint, it relates to
16 the underlying notice itself.

17 And as you'll see or have seen in their response to
18 our request for this conference, your Honor, their argument is
19 not that our notices aren't correct; their argument, their
20 letter starts immediately with this is harmless error and so it
21 should be overlooked. But there are no cases, and certainly no
22 statutory support, to suggest that these types of timing
23 mistakes, which are jurisdictional, are harmless error. These
24 timelines have to be met in order to have the right to
25 terminate in the first place.

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1 THE COURT: I guess I'm trying to figure out what the
2 harm is if they file a subsequent notice. So if what you need
3 is two to eight years from the date of termination and you get
4 one that's early and we regard it as a nullity, why are the
5 artists prevented from filing a notice that comes within the
6 definition of the statute?

7 MR. EDELMAN: They can serve an appropriate notice if
8 they can meet the timeframe in which to do so, and essentially
9 that's -- if they can meet those requirements, that's what
10 we're saying they have to do.

11 THE COURT: So they can serve a notice now?

12 MR. EDELMAN: They can try to serve a notice now.
13 There are other timing requirements that may be implicated that
14 may or may not make their notice too late. But they can
15 serve -- they can attempt to serve an effective notice. They
16 cannot proceed, in our view -- and that would be one of the
17 bases of the motion to dismiss -- on the notices that they have
18 currently served.

19 THE COURT: OK. So if they serve now, presuming that
20 they can effectively serve notice, essentially what they're
21 losing is two years from when they thought they would have the
22 right to get their rights back, correct?

23 MR. EDELMAN: Correct.

24 THE COURT: OK.

25 MR. CRONIN: Your Honor, number one, there is no

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1 irreparable harm with the early notices and --

2 THE COURT: First of all, is the math correct?

3 MR. CRONIN: No, and I will get to that.

4 You know, first there is no jurisdictional defect
5 because the statute actually contemplates that artists who are
6 trying to regain their copyright rights might get some
7 information wrong, and the statute actually says that if they
8 get the dates wrong, that's not fatal. That's number one.

9 Number two. I believe counsel is sort of complaining
10 about two different periods. The artists have 35 years for
11 when they can get their copyright back. So if they are going
12 to exercise their right to reclaim their copyright, that takes
13 effect after 35 years. And if they are going to exercise that
14 right, they have to give notice two to 10 years beforehand.

15 THE COURT: Not after?

16 MR. CRONIN: They can. There is a time period after
17 the 35 years where they can say, you know, OK, we are going to
18 reclaim our copyright and give a date certain.

19 THE COURT: OK. Mr. Edelman says that you can't give
20 the notice before the 35 years expires.

21 MR. CRONIN: I believe that is incorrect.

22 THE COURT: Isn't there a case on this?

23 MR. CRONIN: Well, we have the statute right here.

24 THE COURT: But is there a case on this?

25 MR. CRONIN: Yes. There is the Siegel case that dealt

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1 with the Superman copyright.

2 THE COURT: It seems to me that this issue, either it
3 has been resolved or it is easy.

4 MR. CRONIN: It is easy, I think. I think it is an
5 easy issue, and the Superman case made it clear. The exact
6 claim was in that case. Excuse me. I just want to make sure I
7 get it right. It was that even though there are specific
8 requirements in the notice statute, they are not -- it is not
9 to be strictly construed. In fact, the statute actually says
10 it is not to be strictly construed. There is harmless error.
11 In the Siegel case the Court said that so long as there is
12 sufficient information to assist the grantee in having a
13 reasonable opportunity to identify the affected work, the
14 notice is effective.

15 THE COURT: Could you move the microphone, please.

16 MR. CRONIN: Now, here, counsel is focusing on the
17 catchall language, on the first page of the termination, that
18 says everything that this artist has -- all the copyrights this
19 artist has granted up to 1984.

20 THE COURT: Can you bring the microphone closer to
21 you?

22 MR. CRONIN: Oh, yes. Sure.

23 What they fail to mention is that each notice of
24 termination contains a schedule. The schedule lists works --
25 and this is within all three specific cases we're talking about

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1 today -- that were granted between 1978 and 1982. So the 1984
2 date is irrelevant.

3 And I'll point out again, your Honor -- this is
4 attached to our complaint, these notices with the schedules --
5 the schedules give more than enough notice as to what we are
6 talking about. The schedules give -- in terms of details, the
7 schedules give more details than the Notice of Termination that
8 was upheld in the Superman case, when Warner Brothers lost.
9 For example, we list the names of the works. We list the names
10 of the authors. We list the publication dates. We list the
11 copyright registration numbers. They know what copyrights we
12 want back. And it is disingenuous to argue otherwise.

13 Why are we fighting -- why are they fighting to keep
14 copyrights on the one hand but on the other hand saying we
15 don't have sufficient notice to identify them. And we know
16 that they can identify them because they pay royalties. These
17 companies maintain specific records because they have to pay
18 royalties when they come due. They know exactly what
19 copyrights we want.

20 THE COURT: OK. Aside from identifying or
21 appropriately identifying the rights that you are looking
22 after, I just want to make sure that with respect to the dates
23 that I was stumbling over with Mr. Edelman, again, as I
24 understand his argument, you could not have provided notice
25 that you wanted your copyrights back until after the 35 years

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1 terminated; that is his position, correct?

2 MR. CRONIN: Yes. And I don't believe it is correct,
3 your Honor. The statute is quite clear.

4 THE COURT: OK. And when is the earliest from your
5 point of view that you could have provided that notice?

6 MR. CRONIN: Would you mind in my colleague chimed in?

7 THE COURT: Absolutely.

8 MR. PERRY: The statute says it is two to 10 years
9 before the date of the effectiveness of termination. To work
10 backwards, effectiveness of termination has to fall within a
11 five-year period, between 35 and 40 years. You can give the
12 notice two to 10 years before that date. So, therefore, it is
13 possible to provide notice long before the effectiveness of the
14 termination can actually take place.

15 And what happened here in part is that when the
16 notices described the works that were sought to be taken back,
17 there was a fairly, you know, catchall description that said
18 including, without limitation, grants dated in or about 1984.
19 That language is essentially no harm/no fall, extraneous
20 language, "including without limitation." Admittedly, '84
21 would be premature, but that doesn't undercut the validity of
22 all the other works that are perfectly terminable, the grants
23 of which are perfectly terminable.

24 So focusing on the 1984 is really taking the attention
25 away from what this litigation is really about. And the

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1 reference to the other date, the notice date, which was listed
2 on one work, on one schedule, it said June. It said June and
3 it should have said July. In fact, the one below it said July.
4 That was a few years ago, and the notice said June instead of
5 July. But that is a notice provision, and we believe that
6 that's a harmless error to have said June, 23 months, when the
7 minimum should have been 24 months.

8 THE COURT: So when Mr. Edelman says it's
9 jurisdictional, is there any aspect of that provision that's
10 jurisdictional?

11 MR. CRONIN: Not that I can see. None whatsoever,
12 your Honor.

13 THE COURT: Mr. Edelman.

14 MR. EDELMAN: We just disagree with that. There is a
15 Section of 203 that speaks to harmless error. It gives
16 examples of what harmless error is. The timing regimen for the
17 serving of notices does not fall within the doctrine of
18 harmless error. This is what they need to do to invoke their
19 rights to terminate them. There aren't that many things they
20 need to do to terminate, but this is clearly one of them.

21 The notice has to be given in a timeframe that
22 provides for at least two years notice. The notice that only
23 allows 23 months doesn't meet that two-year requirement. And
24 then, additionally, as we have been discussing -- they're now
25 saying the 1984 is meaningless. That's the only actual date

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1 they reference in their termination notice. They don't give
2 any other dates.

3 THE COURT: What about this schedule that counsel was
4 referring to?

5 MR. EDELMAN: Yes, the schedule -- that's the schedule
6 that has the 1984 date that is attached to the complaint. It
7 doesn't have other dates. It purports to reference all rights,
8 and then it says including the 1984 date, 1984 grant. That's
9 the only grant they reference by date.

10 THE COURT: Let me ask you this. I mean, if it's the
11 case that there is this harmless error provision in the statute
12 and I'm going to be the first judge to sort of construe what
13 that means and construe it in the context of the dates that are
14 provided, why shouldn't I say, well, you know, you were
15 entitled to 24 months notice, you got 23, and now they are
16 going to send you another notice to give you the time that you
17 need? Why isn't that a rational, reasonable construction of
18 that statute?

19 MR. EDELMAN: For them to serve new notice?

20 THE COURT: Yes.

21 MR. EDELMAN: They can attempt to do that.

22 What I'm saying is there are other timing requirements
23 that they may or may not meet.

24 THE COURT: What are those?

25 MR. EDELMAN: I'm not fully familiar with the

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1 specifics of how new notices would play out, I haven't worked
2 through the timing of it. But we are effectively -- I'm not
3 sure I'm saying anything different than you in the sense that I
4 do think these notices need to be withdrawn and they need to
5 try to issue new notices if they can comply with the new
6 notices.

7 By the way, the Siegel case from the Central District,
8 the district court case to which they refer, was not a timing
9 case. It had nothing to do with finding the types of problems
10 at issue here to be harmless error. That was a situation
11 involving Superman, where the termination notice weighed six
12 pounds and it was 570 pages, and the plaintiffs had gone
13 through extraordinary what the Court described as Herculean
14 efforts to list every possible work that they were trying to
15 seek to terminate. They missed a couple of weeks. And the
16 Court said that in that context, given all that they had done,
17 it was harmless error that they missed a couple of the works.

18 That's not what we are talking about here. We're
19 talking about timing issues. We're also talking about -- which
20 it is subject of our letter that I haven't spoken about today,
21 but 203 also has a requirement that you need to specify the
22 date of execution of the grant being terminated, and they
23 haven't done that. Again, these are lawyers who on their
24 websites list themselves as termination specialists under 203.
25 This is their primary focus.

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1 And date of execution of the grant being terminated is
2 critical in order for a recipient to know if 203 applies.
3 There is another statute in the Copyright Act, 304, that might
4 apply instead.

5 THE COURT: What?

6 MR. EDELMAN: 304 is a different statute that might
7 apply instead.

8 THE COURT: OK.

9 MR. EDELMAN: Depending on the date of the works.

10 They also need to specify the date of execution so
11 that the recipient will know when the 203 termination window
12 begins, whether the attempted termination is timely, and to
13 allow the recipient, in this case Sony, to identify the grants
14 at issue.

15 So, these are, in our view, your Honor, very serious
16 issues. These are not technical defects that we're just
17 raising for the sake of filing a 12(b)(6). We don't think that
18 these are correctable by amending the complaint because the
19 underlying defects in the notices will remain the same. So,
20 that's why we are asking your Honor for permission to file this
21 motion.

22 THE COURT: Anything else?

23 MR. CRONIN: Yeah. You know, your Honor, there is
24 nothing irreparable about this. In fact, the notices were
25 completely appropriate.

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1 And I'll correct one thing. I am looking at the three
2 schedules that were attached. There is not a date on here
3 after 1982. 1984 is not on these schedules. So we've
4 specified the works in these schedules.

5 THE COURT: But you specified them in the complaint.
6 Did you specify them in the termination notice?

7 MR. CRONIN: Yes. That's what -- the schedules -- I'm
8 sorry, my apologies. The schedules that I am referring to were
9 attached to the notices, and then we attached the notices with
10 their schedules to the complaint. So, yes, they have had those
11 for years.

12 And, you know, the fact that they haven't specified
13 the date of execution is not fatal. The Siegel Court taught us
14 that. The statute says that. And, in fact, the Siegel Court
15 says that the required contents of a notice must not become
16 unduly burdensome to the grantors and must recognize that
17 legitimate reasons may exist for gaps in the artist's knowledge
18 or certainty. These artists gave -- granted these copyrights
19 in the '70s and '80s. They don't have the contracts anymore.
20 That's not fatal. It is not even close to fatal in these
21 circumstances.

22 THE COURT: Anything else, Mr. Edelman?

23 MR. EDELMAN: I could go on, your Honor, but I think
24 you have the thrust of it.

25 THE COURT: I will let you make your motion.

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1 Is there anything else that we need to do today? I
2 will give you the schedule for the motion, but anything else?

3 MR. EDELMAN: I would just ask you to rule on my -- I
4 meant to raise this at the beginning. I have a pro hac vice
5 application for submission which I don't think the Court has
6 ruled on yet.

7 THE COURT: Are you in good standing wherever you are
8 from?

9 MR. EDELMAN: I am from Los Angeles and I am, your
10 Honor. Thank you.

11 THE COURT: It is granted. So ordered.
12 Anything else?

13 MR. CRONIN: No, your Honor.

14 THE COURT: OK. So four weeks to make the motion?

15 MR. EDELMAN: Yes.

16 THE COURT: Four weeks to respond, two weeks to reply.
17 And we will get you those dates in a second.

18 THE CLERK: The motion is due June 18th, the
19 opposition is due July 16th, and the reply is due July 30th.

20 THE COURT: OK. We are adjourned. Safe travels.

21 MR. EDELMAN: Thank you, your Honor.

22 MR. CRONIN: Thank you, your Honor.

23 MS. LEVIN: Thank you.

24 (Adjourned)